

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
HEATHER BARTELS,)	
)	
Complainant,)	
)	
and)	CHARGE NO: 2000CF1249
)	EEOC NO: 21BA00541
CITY OF O'FALLON,)	ALS NO: S-11439
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

This matter comes to me at the conclusion of a public hearing. The parties filed closing briefs and related pleadings up to February 24, 2003. As such, this matter is now ready for a decision.

Contentions of the Parties

In this case, Complainant contends that she was denied employment as a police officer with Respondent 1) because of her gender; and 2) because Respondent perceived her to have a mental handicap when its clinical counselor failed her on a physiological exam by finding she was under much emotional stress caused by a divorce.

Respondent submits that it failed to hire Complainant as a sworn police officer because her physiological exam revealed that, at the time period in question, she was suffering from such an elevated level of stress that her job performance might have been hindered, placing the public and herself at risk. Respondent further maintains that its failure to hire Complainant had nothing to do with her gender, and that it employed only a few females because of the low number of females in the applicant pool who completed the application process.

Findings of Fact

The following facts I found were proved by a preponderance of the evidence. Those facts marked with an asterisks are facts to which the parties stipulated in their joint prehearing memorandum. Those facts not mentioned in this decision were determined to be unproven, irrelevant or immaterial.

1. In July of 1999, Complainant Heather Bartels applied with Respondent for the position of a city police officer.
2. Complainant completed a series of required tests as part of the application process for the position, which consisted of a polygraph and physical fitness test, an oral interview and a background check.
3. Complainant was the number one candidate on Respondent's hire list based on all of the tests taken at that time.*
4. On July 23, 1999, Complainant received a conditional offer of employment from Respondent. The offer was conditioned upon Complainant's successful completion of both a psychological exam and a medical exam.*
5. On July 28, 1999, at Respondent's direction, Complainant underwent a psychological exam with Respondent's contracted counselor, Dr. Philip Eckert, E.D.D. Dr. Eckert's professional experience included administering and scoring over 3000 police psychological examinations.
6. Complainant's psychological exam included an oral interview, an Intelligent Quotient (I.Q.) test, a battery of written tests, and an ink blot test.
7. At the conclusion of her psychological exam Dr. Eckert determined that, at the time of the test, Complainant appeared to be under "much emotional stress" due to a pending divorce and a child custody battle with her then spouse.
8. Dr. Eckert indicated that based on her test results, Complainant was rigid and may overreact in situations that would require her to remain neutral. He also determined that

she needed to learn "how to assert herself in a self-controlled way so that she does not abuse the power vested in her." (Compl. Ex. 4)

9. Dr. Eckert's written report to Respondent included a scoring sheet with six categories listed as: above average, average, average to below, below average, and not recommended. Dr. Eckert scored Complainant's psychological exam as "average to below" and included next to the score the remark "(at this time)." Dr. Eckert also indicated in his written report to Respondent that "It is highly recommended that Complainant address her present problems and reapply." (Comp. Ex. 4)

10. Respondent had an unwritten policy that it did not hire any candidate that scored "average to below" or lower on the psychological exam.

11. Respondent reviewed Dr. Eckert's written report containing Complainant's score of "average to below," together with his recommendation that Complainant should reapply for the job in the future and determined that Complainant failed the psychological exam.

12. On August 9, 1999, Respondent withdrew the conditional offer of employment previously made to Complainant based on Dr. Eckert's report that Complainant was suffering too much stress at the time of her psychological exam.

13. Respondent subsequently hired a male for the position of police officer.*

14. At the time Complainant applied with Respondent, she was also employed by the City of Collinsville, Illinois as a Community Service Officer (CSO). As a CSO, Complainant did not carry a weapon and was limited in the scope of her duties. CSO duties differed from that of a sworn police officer in that CSOs did not have the power to arrest, did not carry handcuffs or guns, and were limited in the types of calls to which they could respond.

15. On April 15, 2000, Complainant was subsequently hired by the City of Highland as a police officer, but was terminated after seven days on the job because of her personality.

16. On November 11, 1999, Complainant filed a charge of discrimination with the Illinois Department of Human Rights alleging that Respondent failed to hire her based on her gender and a perceived handicap. The Department filed a Complaint with the Human Rights Commission on behalf of Complainant on December 27, 2000.

Determination

Complainant's case should be dismissed with prejudice because she failed to establish a *prima facie* case of discrimination based on either her gender or a perceived handicap.

Conclusions of Law

1. The Illinois Human Rights Commission has jurisdiction over the parties and the subject matter in this case.
2. Complainant is an "employee" within the meaning of section 2-101(A)(1)(a) of the Illinois Human Rights Act. **775 ILCS 5/2-101(A)(1)(a).**
3. At the time of the alleged incidents, Respondent was an "employer" within the meaning of section 2-101(B)(1)(c) of the Act and was subject to the provisions of the Act. **775 ILCS 5/2-101(B)(1)(c).**
4. Complainant failed to establish a *prima facie* case of sex discrimination.
5. Complainant failed to establish a *prima facie* case of perceived handicap.
6. Respondent articulated a legitimate, non-discriminatory reason for failing to hire Complainant.
7. Complainant failed to prove that Respondent's reasons were a pretext for unlawful discrimination.

Determination

Complainant failed to prove by a preponderance of the evidence that Respondent discriminated against her on the basis of her sex or a perceived handicap in

violation of section 2-102(A) of the Illinois Human Rights Act. **775 ILCS 5/1-102 (A)**.

Discussion

In order to prevail in this matter Complainant is required to prove that Respondent failed to hire her because she was female or because Respondent perceived her to have a mental disability, namely stress. Complainant may establish both claims by presenting either direct or indirect evidence of discrimination. Since the record is silent as to any direct evidence of discrimination, Complainant must establish her case by proving discrimination through the use of indirect evidence. In this manner, the Commission employs a three-pronged, burden-shifting analysis to decide whether a complainant has indirectly proved discrimination. (See, **Zaderka v. Ill. Human Rights Commission**, 131 Ill 2d 172, 177 Ill. Dec 31, 545 N.E.2d 684 (1989)). First, Complainant must prove, by a preponderance of the evidence, 1) a *prima facie* case of discrimination, and if she does so, 2) the burden of production shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions, then 3) the burden of proof is placed back upon Complainant to prove that Respondent's actions were not legitimate, but were merely a pretext for unlawful discrimination. (See, **Texas Dept. of Comm. Affairs v. Burdine** (1981), 450 U.S. 248; 67 L.Ed.2d 207, 101 S.Ct. 1089). Although the burden of production may shift to Respondent, the burden of proof remains at all times with Complainant. I will apply the three part analysis to each claim separately below. **Vidal v. Illinois Human Rights Commission, et al.**, 223 Ill. App. 3d 467; 585 N.E.2d 133; 165 Ill. Dec 737 (5th Dist 1991).

Gender Discrimination

Complainant contends that Respondent discriminated against her on the basis of her gender when it failed to hire her as a police officer, and hired a male in her stead. In order to establish a *prima facie* case for sex discrimination in a "failure to hire" context, Complainant generally must show: 1) she was a member of a protected class; 2) she

applied for an open job; 3) she was qualified for the job but was rejected; and 4) someone outside of her protected class was hired for the position. **Patrick and City of Centralia Police Department**, ___ Ill. HRC. Rep. ___, 1990SF0160 (November 16, 1999).

Here, Complainant easily meets the first, second and fourth elements of her *prima facie* case for sex discrimination because it is undisputed that she is female, that she applied for an open position on Respondent's police force, and that a male was hired in her stead. Arguably, at first glance it also seems obvious that Complainant met the third element needed to establish her *prima facie* case, i.e. she was qualified for the job but was rejected, because she was the number one candidate for the position up and until the time she took her psychological exam. Further, it is apparent that Respondent too believed she was qualified to be a police officer because it made to Complainant a conditional offer of employment contingent upon the results of a medical and psychological exam.

It is at this point though where the existence of Complainant's *prima facie* case is not so patent. Respondent determined that Complainant failed her psychological exam based on Dr. Eckert's professional opinion that, because of temporary stress levels, it was not safe for Complainant or others to arm her with the responsibilities of a sworn police officer. However, Complainant argues that she meets the final element of her *prima facie* case because Dr. Eckert marked the line next to the phrase "average to below," but did not mark "not recommended." Thus, the argument follows, based on the marked score in the report of "average to below," Respondent cannot interpret Dr. Eckert's report to mean she was "unqualified" or that she "failed" the psychological exam. I disagree.

A close look at the body of Dr. Eckert's report reveals replete information about Complainant's temporary level of stress. That information, coupled with Dr. Eckert's

concerns surrounding the effects of stress, was sufficient for Respondent to logically conclude that Complainant failed the psychological exam and was not qualified to handle the job "at that time." Too, Respondent reasonably argues that the language in the report, which stated Complainant should reapply for the job in the future, was the linchpin of its decision that she was unqualified for the job at the time. Based on the report, Respondent logically surmised that Complainant failed the psychological exam and withdrew its conditional offer of employment. Because Complainant did not pass the psychological exam, she did not meet the required job qualifications needed to establish the third element of her *prima facie* case.

Even though Complainant cannot establish a *prima facie* case of sex discrimination, her case is still viable because Respondent articulated a legitimate, non-discriminatory reason for its actions. Complainant's requirement to establish a *prima facie* case is now obviated because of its articulation, and the only decisive factor becomes whether or not Respondent's reasons for its actions were a pretext for discrimination. (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), **Clyde v. Human Rights Commission**, 206 Ill. App. 3d 283, 564 N.E.2d 265 (4th Dist. 1990)).

In this case, Respondent's articulated reason for not hiring Complainant was that it had an unwritten policy of not hiring candidates who scored "average to below" or lower on the psychological exam, which was the score Dr. Eckert assigned to Complainant. To prevail, Complainant must now prove Respondent's reason was a pretext for unlawful sex discrimination. Here, Complainant may establish pretext by one of two methods: 1) by indirectly proving Respondent's reason is unworthy of belief, or 2) by directly showing that Respondent was motivated by discriminatory animus to take action against Complainant. **Vidal**, 223 Ill. App. 3d at 470; 585 N.E.2d at 135 (5th Dist

1991). The record does not reveal Complainant met her burden to proof pretext by either method.

First, Complainant attempted to directly establish Respondent's actions were a pretext for unlawful discrimination by arguing that Dr. Eckert harbored discriminatory animus against her because she was getting a divorce from her spouse. Complainant's theory at hearing was that Respondent somehow shielded itself from liability by relying on discriminatory information from Dr. Eckert. Complainant apparently equates stress from divorce as being a "female specific" ailment. Thus, Complainant's argument is that Dr. Eckert, motivated by contempt for females, maliciously scored her as having an acute stress concern, thereby causing Respondent to perceive her as handicapped. The fallacy in this argument is that Dr. Eckert added a note next to Complainant's score of "average to below" indicating that the score was temporary. He further suggested to Respondent that Complainant should re-apply in the future. Without any evidence to show that Dr. Eckert's suggestion was hollow (due to a lengthy testing and application process, for example), the act disintegrates any argument that Dr. Eckert, as Respondent's agent, harbored any discriminatory motivation when he scored Complainant "average to below" on her exam. As previously stated herein, Dr. Eckert even took additional steps to offer his opinion to Respondent that Complainant would make a good police officer in the future. Complainant did not present any evidence convince me that Respondent's articulated reliance Dr. Eckert's recommendation was unworthy of belief.

Second, Complainant attempted to indirectly establish pretext by offering evidence to discredit Dr. Eckert's testing methods and conclusions. In other words, Complainant argued that Dr. Eckert discriminated against her during the testing process itself by applying outdated techniques in an effort to fail her on the psychological examination because she was female. However, Complainant did not establish that

Respondent contracted with Dr. Eckert to test only females for the position of police officer, or that Dr. Eckert used outdated tests only on females and not males. What the evidence did reveal, though, was that there are many different types of tests used by those in the field of psychology to test potential police candidates and that Dr. Eckert has performed over 3000 tests of such candidates.

Next, Complainant submits that Dr. Eckert's testing methods were discriminatory in nature because he called her at home, at Respondent's request, to clarify some of the answers she gave to the test questions on the psychological exam. I must note here that Complainant relied on inadmissible hearsay¹ from the Department of Human Rights' investigatory report in an attempt to rebut Dr. Eckert's credible testimony denying he called Complainant at home. Dr. Eckert explained at hearing that it was not office protocol to contact a police candidate after administering a test and that only Respondent is notified of the outcome of the test. However, Dr. Eckert testified that, even though no direct contact would ever be made with an examinee, both he and his staff are available for a police candidate to come into the office at anytime after an exam to discuss test results. I do believe it is possible that Respondent asked Dr. Eckert to contact Complainant for clarification of her answers, but I find it unbelievable that Dr. Eckert actually did so.

Even assuming *arguendo* that Dr. Eckert did contact Complainant to ask clarifying questions about some of her exam responses, it is not clear to me why Complainant believes that this act is a pretext for unlawful discrimination. If anything the act would be to Complainant's advantage. It further indicates that Respondent was seeking additional information about Complainant's ability to perform the job under stress and that Respondent was not basing its hiring decision on her gender. The

¹ Complainant's contention that statements made as part of the Department's investigatory report constitute admissions by a party opponent is not well taken because: 1) the report only *summarizes* witness statements, and 2) the witnesses testified at the public hearing subject to cross examination.

request for Dr. Eckert to phone Complainant would not have resulted if Respondent was truly looking for a discriminatory reason to exclude her from its employ. Because Dr. Eckert indicated that Complainant's test results were temporary, Complainant's answers in the phone call could have revealed that she had recovered from the stress she was suffering at the time of the initial test. A better score after the follow-up questioning clearly would have made her eligible for the position. Again, a follow-up phone call from Dr. Eckert after the initial exam would have been beneficial to Complainant in this case. Therefore, I find that even if Dr. Eckert called Complainant at home, it would not have been a pretext to commit unlawful discrimination.

Finally, Complainant attempted to establish that Respondent's unwritten policy of not hiring job candidates who scored "average to below" or lower on the psychological exam was a pretext for discrimination. However, Complainant did not present evidence of why the unwritten policy was discriminatory. For example, Complainant failed to demonstrate that Respondent applied the policy only to her, or applied it only to females for that matter. In fact, she did not present a scintilla of evidence of any other candidates, male or female, who were hired with an "average to below score" or lower. Without such evidence, Complainant cannot establish that the policy was a pretext for gender discrimination in hiring police officers for Respondent's police force.

Perceived Handicap Discrimination

Section 2500.30 of the Joint Rules of Illinois Department of Human Rights and the Human Rights Commission makes it unlawful to discriminate against a person on the basis of a perceived handicap. **56 Ill. Admin Code 2500.30.** To establish a *prima facie* case of perceived handicapped discrimination Complainant must prove: 1) Respondent perceived her to be handicapped and 2) took an adverse act against her on the basis of the perception. **Steinmetz and Hydraulics, Inc.**, __ Ill. HRC. Rep. ___, 1989CA3195 (January 5, 1995).

The Joint Rules further provide that a person may be perceived to be handicapped if she is "misdiagnosed, misclassified or erroneously viewed as one who has been so afflicted." **56 Ill. Admin. Code 2500.30**. In this case, Complainant argues that Respondent's clinical counselor misdiagnosed her as having stress, and that Respondent relied on the counselor's report to erroneously view Complainant as being handicapped due to the stress. However, to succeed under the theory of perceived handicap discrimination, the Act requires more than mere perception of a condition. It requires that Respondent must have perceived Complainant to have a "determinable" characteristic, resulting from "disease, injury, congenital condition of birth or functional disorder," which excludes such conditions that are "transitory and insubstantial" in nature. **775 ILCS 5/1-103(l); 56 Ill. Admin. Code 2500.20(b)(1)(A)**. From the evidence presented at hearing it is difficult to determine that Respondent perceived Complainant to be handicapped as defined by the Human Rights Act.

In this case, Respondent's contracted clinical counselor, Dr. Phillip Eckert, reported to Respondent that Complainant was suffering from emotional stress "at this time." It is logical to believe that Respondent interpreted this language as though Complainant's stress was temporary and that it did not perceive Complainant to have a "determinable" stress condition, but rather a transitory condition, *i.e.* one that would be corrected or dissolved over a period of time. From all accounts, Dr. Eckert determined that, in the future, Complainant would have made a good police officer, but that *at the time of his examination* she suffered from too much stress to place her on a police force in the protection of others. Even Complainant's own retained expert psychologist agreed that stress was "a variable," and that one suffering from stress in 1999, may not be suffering from stress today. (tr. vol. II, p. 14-15). Accordingly, because Complainant's condition was temporary or "transitory," and more important because Respondent viewed Complainant's stress as a temporary condition, as a matter of law she could not

have established a *prima facie* case of actual or perceived handicap. As such, if Complainant cannot meet the qualifying definition of "handicap" to be protected by the Act, then Respondent is not required to articulate a legitimate, non-discriminatory reason for its actions and Complainant's case fails at this juncture.

However, Complainant may also argue that she is protected by the Act because the Joint Rules of interpretation provide that perceived handicapped discrimination "...may also occur in connection with a person whose current non-disabling condition, e.g. hypertension, is viewed as creating the potential for future disability." **56 Ill. Admin Code 2500.30(3)(b)**. Again though, the record does not establish that Respondent perceived Complainant as suffering from any "condition," per se. The record simply supports that Dr. Eckert determined that Complainant was suffering from a period of emotional stress that would place her and others at risk in performing the job of a police officer. It would be against the manifest weight of the evidence in this case to find that Respondent or Dr. Eckert perceived Complainant's stress as anything other than a temporary affliction at the time she made application to become a police officer. Dr. Eckert further recommended to Respondent that Complainant re-apply for the job in the future. To indicate Respondent did not hire Complainant because of a potential for future disability would fly in the face of conventional logic. In fact, I find that the facts support just the opposite and that Complainant's case of perceived handicap discrimination must be dismissed.

Disparate impact discrimination

Lastly, although it is not pleaded in the Complaint, Complainant presented weak statistical evidence in this case to support the contention that Respondent favored males in its hiring practices. It appears that through the use of statistics, Complainant has attempted to assert a claim that Respondent's selection process has a disparate impact on females who apply for the job of police officer. If that is so, then Complainant must

establish that not only is there a statistical difference in the gender make up of the workforce, but also that a causal link exists between an employment practice and the statistical imbalance in the workforce. **Shabez and Secretary of State Police**, __ Ill. HRC. __, 1991SF0546 (January 23, 1996).

While Complainant provided statistics to show a ratio of 8.74 males hired for every female hired by Respondent, her statistics revealed only a small pool of 263 total applicants over a five and half year time period. The Commission has previously held that "small sample sizes detract from the value of statistical evidence." **Carter and City of Springfield**, __ Ill. HRC. __, at 9, 1979SF0023, consolidated (Order and Decision, August 29, 1997). This fact is well demonstrated in this case when one looks at the number of females who were offered employment over the five and a half year time period referenced by Complainant. While only two females were actually hired during that time period, the record revealed that in 2001 alone, Respondent made conditional offers of employment to ten females and sixty-five males. In that year, all ten females either withdrew from the hiring process or did not respond to the offer of employment. Without this pertinent knowledge of the applicant pool, and if the Commission followed Complainant's argument, it would find Respondent's statistical ratio skewed to show the male to female hires for 2001 to be 1:0. This evidence is simply inaccurate and cannot be relied upon in this case.

Further, Complainant did not provide any evidence whatsoever or any argument to tie Respondent's selection process to a discriminatory hiring practice. Complainant's argument is that the statistics alone show some sort of gender bias. As stated above, statistics alone are not enough to establish gender bias, there must also be a causal link to unlawful discrimination. (see, **Shabez**, at 14.) Without such evidence, Complainant's *prima facie* case must fail.

Recommendation

Based on the above findings of fact and conclusions of law, I recommend that the Illinois Human Rights Commission dismiss with prejudice the complaint of HEATHER BARTELS against the CITY OF O'FALLON, together with the underlying charge.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Illinois Human Rights Commission

ENTERED THE 4TH DAY OF JUNE, 2003.